No. 15654

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES MIMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

Statutes

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APPELLEE'S BRIEF.

I.
JURISDICTIONAL STATEMENT.

This is an appeal from a judgment after conviction following trial by jury under Title 21, United States Code, Section 174. Jurisdiction of this Honorable Court on appeal is conferred by virtue of the provisions of Title 28, United States Code, Section 1291 and Section 1294.

II.
STATEMENT OF THE CASE.

The events leading to Mims' arrest begin on September 14, 1956, when Reverend Powell informed Federal Narcotics Agent Malcolm Richards that Mims was selling narcotics at 1114 E. 10th Street. [R. T. p. 21, lines 8-14; p. 22, lines 16-18.] Richards called a telephone number given him by Powell. A female voice answered, and at Richards' request, the woman turned the phone over to a man, who said, "I am Mims." [R. T., p. 21, lines 11-17.] As a matter of fact, it *was* Mr. Mims who spoke to Richards after Miss Barnett had answered the phone. [R. T. p. 133, lines 6-14.] Mims and Richards then arranged a sale of narcotics at 1114 E. 10th Street. [R. T. p. 21, line 18, to p. 22, line 15.] Richards drove

to that address with three other officers at 3:00 p.m. the same day and observed Mims looking out of the window as he (Richards) was entering the building. [R. T. p. 22, line 16, to p. 23, line 4.] After Agent Richards entered the building, he identified himself as "Deacon Allen" [R. T. p. 27, lines 8-9], but Mims said that he was not Mims, but that "Mims would be here in a few minutes." [R. T. p. 27, lines 10-11.] Shortly thereafter, Frank Sabbath arrived [R. T. p. 28, lines 10-11] and Mims and Sabbath engaged in conversation in the hallway. [R. T. p. 28, lines 7-9.] Sabbath was apparently supposed to be masquerading as Mims when he walked over to speak to Richards. After Richards asked Sabbath how much stuff $150 would buy, the latter returned to Mims and asked the same question. [R. T. p. 110, lines 12-22.] Mims told Sabbath it would buy a half-ounce. [R. T. p. 110, lines 23-24.] Then Mims gave Sabbath the half-ounce of heroin [R. T. p. 111, lines 22-23], after which Sabbath and Richards went into another room where the sale was consummated. [R. T. p. 30, lines 11-25.] While they were still in the room, it was made more apparent that Sabbath was "fronting" for Mims when Bonnie Barnett knocked at the door and said "Frank, I want to see you." When Agent Richards said that he thought his name was Mims, Sabbath informed Richards that people called him Mims sometimes. [R. T. p. 31, line 24, to p. 32, line 5.] It should also be noted that Miss Barnett also saw Mims hand the package to Sabbath. [R. T. p. 134, lines 20-22.] Frank Sabbath completed his errand by turning the $150 over to Mims, who gave him $10 for his services. [R. T. p. 113, lines 11-22.] Agent Richards had already left the premises when Sabbath gave Mims the money. On February 28, 1957, a verdict of guilty was returned against James Howard Mims.

III.
ARGUMENT.

A.

On an Appeal From a Conviction the Appellate Court Should View the Evidence in a Light Most Favorable to the Government and Grant Every Intendment in Favor of the Verdict of the Jury.

In arguing that the evidence as presented in the trial court was insufficient to sustain the conviction without the testimony of Frank Sabbath and Bonnie Barnett, the appellant alluded many times to the inconsistencies and contradictions in the testimony, particularly that of Miss Barnett. It is invariably held in the Federal Courts that upon appeal from a conviction, the evidence and all inferences which may reasonably be drawn therefrom are to be viewed in the light most favorable to the government.

United States v. Glasser, 315 U. S. 60, 80;

Schino v. United States, 209 F. 2d 67, 72 (9th Cir., 1953) *cert. den.,* 347 U. S. 937;

United States v. Brown, 236 F. 2d 403, 405 (2d Cir., 1956);

Arena v. United States, 226 F. 2d 227 (9th Cir., 1955), *cert. den.,* 350 U. S. 954.

If the rule were otherwise, the appellate court would be usurping one of the functions of the jury, namely, that of trying the facts. In light of this well established canon of review, the impropriety of *appellant's* weighing of the evidence and credibility of witnesses is apparent. As the court succinctly stated in *Dean v. United States,* 246 F. 2d 335, 337 (8th Cir., 1957):

". . . The jury having returned verdicts of guilty, we must assume that all conflicts in the evi-

> dence were resolved in favor of the government and, as we have often said, the prevailing party is entitled to the benefit of all such favorable inferences as may reasonably be drawn from the facts proven and if, when so considered, reasonable minds might reach conclusions the issue is one of fact to be submitted to the jury and not one of law to be determined by the court."

Merely because there were conflicts in the testimony of the witnesses vis-a-vis one another cannot sustain appellant's conclusions that the evidence is insufficient or that the testimony of Miss Barnett or the other witnesses is "clearly false." Appellant does not really know whose testimony was false. *All appellant can possibly be sure of is that the conflicts were resolved against him.* This is hardly sufficient reason to single out Miss Barnett, or any other witness as a liar. Needless to say, it is hardly proper to consider the evidence in a light most *unfavorable* to the Government when the rule in the Federal Courts is exactly the opposite.

It is therefore respectfully submitted that the evidence should be viewed in the light most favorable to the Government. *United States v. Glasser, supra; Schino v. United States, supra; Arena v. United States, supra; United States v. Brown, supra.* And it is further submitted that the statement of facts included herein properly presents the evidence.

B.

In the Absence of a Request for an Instruction That Testimony of an Accomplice and a Convicted Perjurer Should Be Received With Caution, the Court's Failure to Give Such an Instruction on Its Own Motion Is Not Reversible Error. This Is Especially True Where No Objection, Pursuant to Rule 30 of the Federal Rules of Criminal Procedure, Is Made to the Instructions as Given.

One of the most basic of rules in the Federal Courts is that whenever *any specific* instruction is desired by a defendant, such defendant must request the instructions of the trial court. It follows that error may not be predicated on the trial judge's failure to then give the instruction on his own motion.

Goldsby v. United States, 160 U. S. 70, 77;

Zamloch v. United States, 193 F. 2d 889 (9th Cir., 1952);

Himmelfarb v. United States, 175 F. 2d 924, 944 (9th Cir., 1948), *cert. den.,* 338 U. S. 860;

Obery v. United States, 217 F. 2d 860 (D. C. Cir., 1954).

This rule is especially clear in the Federal Courts with respect to the effect to be given the testimony of an accomplice. While it is considered better practice to give an instruction against placing too much reliance upon the testimony of an accomplice, still the failure to give such an instruction is not error.

United States v. Caminetti, 242 U. S. 470, 495;

United States v. Capitol Meats, 166 F. 2d 537, 539 (2d Cir., 1940), *cert. den.,* 334 U. S. 812.

This rule was recently reaffirmed in this circuit in *Papadakis v. United States,* 208 F. 2d 945, 954 (9th Cir., 1953). In other words, the responsibility of framing adequate instructions is not borne by the trial judge alone, but is shared by the trial attorney. In speaking of Rule 30 of the Federal Rules of Criminal Procedure. This Honorable Court admonished attorneys that:

> ". . . (p)ainstaking compliance with its requirements, although not an easy matter for the lawyer, is of the very essence of the orderly administration of criminal justice." *Enriquez v. United States,* 188 F. 2d 313, 316 (9th Cir., 1950).

In the instant case, appellant did not avail himself of Rule 30 by requesting an instruction concerning the scrutiny to be given the testimony of an accomplice, or by objecting to the instructions as given, *even when the trial judge asked if counsel had any further suggestions or objections.* [R. T. p. 220, lines 17-22.]

It should also be noted that because of the striking facts of this trial, the chances of prejudice resulting from Frank Sabbath's testimony are remote, if not non-existent. It was clearly brought out during the cross-examination of Sabbath that he originally told the authorities and appellant's counsel that his father, Reverend Powell, had given him the narcotics. [R. T. p. 123, lines 7-18.] In other words, the fact that Sabbath *changed* his story to implicate Mims was clearly before the jury when they evaluated his testimony. The fact that he was also an accomplice of Mims' was also before the jury. It is reasonable to assume that *under such circumstances, the jury put the testimony of Frank Sabbath to the sternest and most rigorous of tests.* The issue then was one of credibility, and in spite of Sabbath's changes in his story, the jury chose to be-

lieve his story in conjunction with those of the other government witnesses, and chose not to believe Mims. It needs no repeated citation of authority to state that credibility and weight to be given evidence were questions for the trier of fact.

Upon close reading, the authorities cited by appellant do not appear to sustain his position, either. In *United States v. Levi,* 177 F. 2d 827 (7th Cir., 1949), the actual ground of reversal was an improper question about a prior conviction asked by the United States Attorney. *Morris v. United States,* 156 F. 2d 525 (9th Cir., 1946) was reversed because of the trial judge's failure to instruct the jury as to the nature of the offense and the statutes involved therein. Needless to state, a *general* instruction *on the law* involved in a criminal case is far different from a desired *specific* instruction on the *credibility* of accomplices. In the latter instance, a request must be made of the trial court. *Papadakis v. United States, supra.*

Freed v. United States, 266 Fed. 1012 (D. C. Cir., 1920), upon which appellant relies heavily, involved the trial judge's *refusal* to give an instruction on the testimony of accomplices. It needs little discussion to point out that *Freed* is an entirely different case from the instant case—the *refusal* to give this particular *requested instruction* cannot be equated with the failure of a judge to give a specific instruction on his own motion without a request. The former may be reversible error, but the latter never is. *United States v. Caminetti, supra; United States v. Capitol Meats, supra; Papadakis v. United States, supra.*

Regardless of appellant's citation of cases from the Third Circuit, it is submitted that the same rule be applied to the failure of appellant to request an instruction with respect to Miss Barnett's testimony and the court's sub-

sequent failure to give such instruction. The *general rule that any desired specific instruction must be requested, Goldsby v. United States, supra; Obery v. United States, supra; Zamloch v. United States, supra,* has not been deviated from in any circuit other than the Third Circuit. As such, it would appear to be an aberration peculiar to that Circuit alone. A close scrutiny of appellant's cases also leaves some considerable doubt as to whether even that circuit has really departed as completely from the general rule as appellant seems to contend. For example, in *United States v. Segelman,* 83 Fed. Supp. 890 (W. D. Pa., 1949), the defense was not allowed to question a government witness about a conviction for perjury upon which a motion for a new trial was then pending. The court merely said that the defense should have been allowed to develop that fact, regardless of the pending motion. In *United States v. Margolis,* 138 F. 2d 1002 (3d Cir., 1943), the reversal of one count went off on a different ground, namely, that "the expression of an opinion which is irrelevant cannot be the subject of perjury." (138 F. 2d 1002, 1005.) The conviction for perjury was accordingly reversed.

Regardless, however, of the vitality or validity of the "Third Circuit Rule," *the fact that the jury was informed of Miss Barnett's prior perjury conviction* [R. T. p. 136, lines 19-23] *almost precludes the possibility of any prejudice resulting from her testimony,* according to authority which has received the Supreme Court's stamp of approval: *Hilliard v. United States,* 121 F. 2d 992 (4th Cir., 1941), *cert den.,* 314 U. S. 627. In *Hilliard* the court in considering much the same problem as presented herein, said at page 1000:

> "The defendant complains that the jury was not expressly told that they should scrutinize the testi-

> mony of Stella Vaughan with care and caution. It would have been well to have given an instruction in these very words; *but there was no prejudicial error, for the bearing of the witness' manner of life on her credibility was specifically called to the jury's attention, so that they were not without warning in this respect . . .*" (Emphasis added.)

In the instant case it is reasonable to assume that *the jury, after being informed of Miss Barnett's prior perjury conviction, considered her testimony with great care.* Once again, the issue narrows to one of credibility, the determination of which was for the jury.

It should also be noted that the judge's instructions as to the credibility to be given witnesses were quite adequate to cover both Sabbath and Miss Barnett, though he used Sabbath as an example. [R. T. p. 215, line 25, to p. 218, lines 25; also reproduced on pages 9 to 11 of Appellant's Brief.] In particular the following passage should be noted:

> "It might be impeached simply by reason of the base character of the witness who testifies. As reasonable men and women of adult years you will realize that there are people in life who are of such a character that you wouldn't accept their testimony just because of the kind of a person they are." [R. T. p. 216, lines 11-16.]

In light of the above quoted authorities and the information presented to the jury concerning the past reputations and actions of Mr. Sabbath and Miss Barnett, it is respectfully submitted that the trial court committed no error by its failure to give specific instructions relative to the credibility of these two witnesses, when appellant did not re-

quest such instructions. Nor is there anything in the record before this Honorable Court on appeal which could constitute "plain error" within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure.

C.

No Reversible Error Was Committed by the Trial Court in Excluding Appellant's Testimony Concerning Business Transactions Between Himself and Reverend Powell, Which Testimony the Trial Court Considered Irrelevant. Even If Any Error Was Committed, It Was Harmless.

In light of the government witnesses' testimony which positively placed Appellant Mims at the center of the narcotics transactions of September 14, 1956, it is difficult to see what possible relevance the *motives* of Reverend Powell, the informer, had to the issues in this case. Regardless of whether Reverend Powell informed because of a sense of righteousness, or out of spite, the facts are clear that Mims was observed by Agent Richards taking an active part in the sale of a half-ounce of heroin. [R. T. p. 28, line 7, to p. 30, line 12.] Richard's testimony was complemented and corroborated by Frank Sabbath [R. T. pp. 105-114] and Bonnie Barnett. [R. T. pp. 131-137.] In other words, whatever motive Powell had in informing is not material because the information he imparted to Agent Richards was not in any way connected with James Mims' activities as a dope peddler. It should also be noted that it is unlikely that Powell had any different or stronger motives in informing against Mims than he had had in informing against others in the past, as Powell was well known to the authorities as an informer and had performed this function many times before. [R. T. p. 43, line 21, to p. 44, line 17.]

It is also difficult to understand how error can be predicated on the exclusion of this testimony when *supposedly* used to show why Mims was on the premises, when *in fact he was allowed to show why he was there through other testimony.* Mims starts his narrative by testifying that he drove to 1114 E. 10th Street with Reverend Powell on September 14, 1956. [R. T. p. 148, lines 1-11.] During the course of direct examination, Mims testified that Powell told him to take a trust deed and get himself a house. This answer was allowed in the record because Mims answered before an objection could be made. [R. T. p. 149, lines 2-14.] After they arrived, Mims testified that he was instructed by Powell to go into the building at 1114 E. 10th Street. [R. T. p. 154, lines 3-4.] Mims then testified that "Deacon Allen" was coming over to meet *Powell.* (P. 156, lines 5-10.) After "Deacon Allen" (Agent Richards) had arrived, Frank Sabbath came in, and according to Mims, brought a package for "Deacon Allen" from Powell. [R. T. p. 162, line 19, to p. 163, line 6.] At this point Mims alluded to the business difficulties he was allegedly having with Reverend Powell when he testified as follows:

> "Mims: I told him I wasn't going to give him a goddam thing; I wants my money.
>
> Mr. Ridley: What did you do at that time? A. I went out this back door to his house on the other street.
>
> Q. Did you have some reason for going out the back door? A. He had been dodging me, and that's when I was catching up with him.
>
> Q. You had sent Frank to pick the Reverend up, is that right? A. Yes, sir.
>
> Q. The Reverend was supposed to have come down with some money for you? A. That's right.

Q. Then Frank came back alone? A. That's right." [R. T. p. 163, lines 8-23.]

As for showing Mr. Sabbath's bias or motives to falsify his testimony, the fact that he had originally implicated his father and then changed his testimony to implicate Mims was sufficient to demonstrate possible bias to the jury, and inject that possible element in their deliberation.

As a matter of fact, much of the foregoing discussion was only included in Appellee's Brief for the sake of completeness because the actual offer of proof was not made for some of the purposes which appellant alleges in his brief. The *Opening Statement* which appellant cites on page 13 of his brief is *not* an *offer of proof*. The actual offer of proof was as follows:

> "Your Honor, there is a period of time here in which Mr. Mims, according to the testimony of Frank Sabbath, allowed Sabbath to go to Vernon and Central to pick up his father. Now, during that period of time, Mr. Richards claims that certain calls were made and that he had had contact with Reverend Powell that morning. Now, I would like to show if I could, that along the line suggested by the boy's testimony, actually the boy did go to Vernon and Central and get the stuff from Reverend Powell and bring it down here . . ." [R. T. p. 151, lines 3-11.]

Thus, the testimony in fact was never offered to show *bias*. Regardless, therefore, of the exclusion of the testimony relating to *business transactions* between Mims and Powell, appellant was subsequently allowed to show by his own testimony exactly what was in his *offer of proof*, to wit, that Sabbath got the stuff from Powell, and

brought it back to 1114 E. 10th Street. [R. T. p. 162, line 19, to p. 163, line 6; p. 163 lines, 8-23.] Appellant never tried to show bias in his *direct examination* of Mims. *Furlong v. United States,* 10 F. 2d 492 (8th Cir., 1926), upon which appellant relies held that it was error not to allow the defense to show the bias or prejudice of a government witness by *cross-examination.* It is almost too obvious to point out that appellant's counsel was not cross-examining his own client in an effort to show bias. His own offer of proof, *supra,* leaves no doubt of this. It is therefore submitted that the *Furlong* case clearly has no application to the excluded testimony the appellant gave on direct examination.

Conclusion.

1. On an appeal from a conviction the Appellate Court should view the evidence in a light most favorable to the Government and grant every intendment in favor of the verdict of the jury.

2. Questions concerning the credibility of witnesses are not properly open to an appellate court, even when there were conflicts in the testimony.

3. Whenever any specific instruction is desired by the defendant, he must request such instruction of the trial court or must object to the instructions as given, as provided in Rule 30 of Federal Rules of Criminal Procedure.

4. In absence of a request for an instruction concerning the credibility of an accomplice's testimony, the trial court's failure to give such an instruction is not plain error within the meaning of Rule 52(b). This is especially true where the accomplice's testimony was vigorously challenged in the jury's presence.

5. When a witness's prior conviction for perjury is clearly called to the jury's attention, the failure of the trial court, in the absence of a request by the defendant, to give an instruction that the testimony of a convicted perjurer must be received with extreme caution is not plain error within the meaning of Rule 52(b).

6. The trial court did not commit reversible error in excluding the appellant's testimony about business transactions which are unconnected with the issues being tried.

Wherefore, the United States respectfully requests this Honorable Court to affirm the judgment of conviction.

Respectfully submitted,

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